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Administrative Order on Consent Under Section 122(g)(1)(A) of CERCLA for the Chemical Recovery Systems Site, Elyria, Ohio Docket No. V-W-03-C-750 Response to Comments

Chemical Recovery Systems Site
Elyria, Ohio

RESPONSE to COMMENTS

On August 20, 2003, the United States Environmental Protection Agency (U.S. EPA) published a notice in the Federal Register, giving notice in accordance with Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. 9622(i), of a proposed administrative settlement for recovery of response costs concerning the Chemical Recovery Systems Superfund Site in Elyria, Ohio. That notice requested public comments be provided to the Agency in written form by September 19, 2003. The notice further stated that the Agency will consider all comments received and may modify or withdraw its consent to the settlements if comments received disclose facts or considerations which indicate that the settlements are inappropriate, improper, or inadequate.

The Agency has received two sets of written comments on the proposed settlement. This responsiveness summary has been prepared to address those comments.

BACKGROUND

Site Location and Description

The Chemical Recovery Systems Superfund Site ("Site" or "CRS Site") is approximately 2.3 acres in size, and it is located at 142 Locust Street in a predominantly commercial/industrial area in the city of Elyria, in Lorain County, Ohio. The Site occupies a part of a peninsula jutting into the Black River.

The western boundary of the Site runs along the bank of the East Branch of the Black River ("River"); the northern boundary of the Site adjoins property owned by the Englehard Chemical Company; the eastern boundary runs along Locust Street, with Englehard Chemical Company on the other side of that street, and the Site's southern boundary adjoins the property of M&M Aluminum Siding.

From 1960 through 1974, Russell Obitts formed and operated two companies, Obitts Chemical Services and Obitts Chemical Company, both of which conducted operations at the Site. The former operated as a solvent reclamation facility, the latter sold solvents to industry. Obitts obtained "scrap" or "spent" organic solvents from various companies. After distilling away the impurities in the "dirty" solvents, the "cleaned" reclaimed solvents were repackaged and sold. The solvents were transported to and from the Site in 55-gallon drums or by tanker trucks. Mrs.

Obitts has stated that when her husband began the business, its principal customer and the primary source of spent solvent sent to the Site was Sherwin-Williams.

In 1974, Chemical Recovery Systems (CRS) assumed operation of the Site through a stock purchase agreement with the Obitts Chemical Company. In a separate agreement, CRS leased the lots on the peninsula west of Locust Street from Dorothy Obitts, with an option to purchase. Later, CRS exercised its purchase option. Still later, CRS defaulted on payment for the property, and Dorothy Obitts re-assumed uncontested ownership following a legal action.

The Site is currently owned by an Obitts family trust. The Site is presently leased and used for storage purposes by M&M Aluminum Siding. The Site is fenced in on all sides except for the side bordering the River, which is overgrown by heavy vegetation. All tanks, drums, trucks and other equipment related to solvent reclamation operations were removed from the Site over twenty years ago. At that time some surface soil was removed and graded, as well.

The contamination at this Site results primarily from solvent reclamation activities conducted at the Site from 1960 until 1981. Investigations of the Site undertaken by U.S. EPA under CERCLA between 1982 and 1995 have shown that the subsurface soil and groundwater at the Site was contaminated, primarily by volatile organic chemicals, presumably related to spills and leaks from the solvent reclamation activities that took place on the Site over a period of two decades, between 1960 and 1981. According to these studies, groundwater flow direction is toward the river. Studies have indicated little or no potential for exposure to contaminated groundwater migrating from the Site.

Enforcement History at the Site

The CRS Site has been the subject of U.S. EPA actions for over twenty years, beginning with a RCRA 7003 action in 1981[1], and subsequent studies under CERCLA conducted between 1982 and 1995. The CRS Site is a "non-NPL equivalent" Site. This term refers to a category of sites which have not been nominated for the National Priority List (NPL), although the Agency and the State believe that information gathered about the Site and expressed in the Site's pre-score indicates it would merit ranking on the NPL if it were nominated. The Agency is experimenting with a new approach for this category of sites, giving potentially responsible parties (PRPs) an opportunity to initiate study and cleanup activities without the Agency first formally listing the

[1] A Consent Decree resolving this action required the removal from the Site of all tanks, drums and vessels associated with the solvent reclamation company's operations and also required the removal of the top layer of surficial soil.

Site on the NPL. The Agency hopes this new approach will expedite response actions and believes it may also reduce transaction costs for PRPs and for the Agency.

A Potentially Responsible Party (PRP) search begun in March 1999, developed substantial information regarding potentially responsible parties at the Site. U.S. EPA investigators located a corporate officer of Chemical Recovery Systems, Inc., (CRS) a Michigan corporation. Interviews with this individual and other former employees of CRS and subsequent information requests led to the discovery, in 2000, of a substantial quantity of CRS company records giving details of solvent reclamation operations conducted at the Site.

The investigators also located a number of additional witnesses who had been employed by the Site operators over the approximately twenty year period of solvent reclamation activities at the Site. Additional witnesses were interviewed and summaries of a large number of these interviews have been shared with the PRPs upon request.

A general notice letter dated March 2, 2001, was sent to all potentially responsible parties who had been identified by the Agency at that time.[2] U.S. EPA continued (and still continues to this day) to search for additional PRPs who may be liable for costs incurred at this Site. Several additional major parties have been found this year, and will soon be formally identified as PRPs.

An Itemized Cost Summary (ICS) showed $408,000 in past costs incurred and not reimbursed as of March 31, 2001. U.S. EPA next issued a Special Notice letter, pursuant to Section 121 of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), for RI/FS negotiations for this Site on June 27, 2001.

Negotiations for an RI/FS Order

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[2] That general notice was sent to 129 "PRPs" identified by the Agency at that time. The number of PRPs on the PRP list has fluctuated since then for several reasons. U.S. EPA has added new parties as PRPs as and when it was able to find viable successors to companies which had evidently sent spent solvent to the Site according to the CRS records. U.S. EPA has also dropped a few companies from the list when and if those companies have been able to demonstrate, by presenting new and persuasive evidence, that they were probably not potentially liable at this Site. Originally, U.S. EPA sent multiple notices to separate plants or divisions belonging to the same corporation, so the original PRP list contained multiple entries for PPG, Sherwin-Williams, Ashland, Avery Dennison and others. There were 142 company names on the PRP list at the time of Special Notice on June 27, 2001. At this time, on September 25, 2003, there are 133 PRPs identified on the PRP list for this Site. U.S. EPA proposes to conclude a *de minimis* settlement with 83 of these companies.

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Copies of a draft Administrative Order on Consent (AOC or Order) and a draft Statement of Work (SOW) were enclosed with the Special Notice letter. That Notice went to all of the 142 potentially responsible parties who had been identified by the Agency at that time by general notice letters. The Notice made demand for the $408,000 in past costs and invited all PRPs to undertake RI/FS activities at the Site pursuant to an AOC.

U.S. EPA attended a meeting sponsored by some of the PRPs in May 2001, in Cleveland, to discuss the Site. U.S. EPA held its own meeting in Chicago on June 26, 2001, inviting all PRPs in an effort to stimulate the formation of a Steering Committee. Approximately two dozen of the largest PRP companies did form a Steering Committee in July and submitted a letter, offering to negotiate a good faith proposal, on August 24, 2001.

That letter proposed a meeting in September and offered to provide a "markup" of the AOC for RI/FS and SOW at some unspecified future time. The Steering Committee met with U.S. EPA on September 10, 2001.

Since that meeting, U.S. EPA provided these PRPs with a great deal of information about the Site, including State files, U.S. EPA files, 104(e) responses and the relevant records kept by the CRS company regarding Site operations.

U.S. EPA and these PRPs exchanged draft revised versions of the AOC for RI/FS and the SOW. These PRPs asked Agency personnel to come to Cleveland for a meeting to discuss the AOC and SOW. They indicated that they could not hold such a meeting any earlier than March 6, 2002. Agency representatives agreed to come to Cleveland and meet on that date.

At that meeting, these PRPs argued that the Agency should include language in the Order for RI/FS promising to seek reimbursement from other PRPs at the Site (who did not sign the Order for RI/FS) before pursuing the "Performing Parties" (those who signed an Order to perform the RI/FS, sometimes referred to hereinafter as the Group) for any costs other than oversight costs incurred by U.S. EPA. On EPA's rejection of this proposal, the PRPs suggested that the performing parties be forgiven the $408,000 demanded (with the Agency to pursue the other parties--more than a hundred PRPs who did not sign the Order for RI/FS-- by *de minimis* settlements and other cost recovery mechanisms). The Agency rejected this proposal as well, being unwilling to compromise the principle of joint and several liability by "forgiving" past costs to this Group while promising to pursue other parties for those costs.

On Wednesday, May 29, 2002, the Superfund Division Director for the United States Environmental Protection Agency ("Agency"), Region 5, William E. Muno, issued an Administrative Order on Consent ("Order") signed by 24 potentially responsible parties (PRPs).

Under the Order, these PRPs (the Group) will conduct a remedial investigation and feasibility study (RI/FS) for the Chemical Recovery Systems Site (CRS Site) in Elyria, Ohio.

The Administrative Order for RI/FS required the Respondents to pay U.S. EPA's oversight costs on an annual basis, but the Order was silent on the issue of payment of past and future costs. The Agency has retained its right to pursue any PRP for such costs, but it has assured the 24 Respondents of the AOC for RI/FS that it will seek to recover some of the Agency's costs from *de minimis* parties. U.S. EPA has also stated its intention to set up a special account for money paid in a *de minimis* settlement. The funds in that account are to be spent at this Site, or to reimburse the Fund for past costs incurred at this Site.

Development of a Volumetric Ranking

When the AOC for RI/FS was signed, U.S. EPA returned its attention to the development of a strategy for preparing a volumetric ranking of spent solvent sent to the Site by PRPs, based on the available documentary evidence acquired by the Agency in the course of its investigations and supported by the statements of witnesses interviewed. During the previous year, the Agency had already tasked its PRP Search Contractor, TechLaw Inc., (TechLaw), to begin work on this project by digitizing the available documentary information from the CRS records and Section 104(e) responses and preparing a Waste-In list. The Waste-In list and Volumetric Ranking were prepared in accordance with all relevant U.S. EPA guidance.[3]

As noted above, U.S. EPA investigators had located a corporate officer of Chemical Recovery Systems, Inc., a Michigan corporation (CRS Michigan). This individual had played a leading role in setting up the CRS Michigan company as a solvent reclamation facility,[4] and he had also played a leading role in setting up the Chemical Recovery Systems, Inc., facility in Elyria, Ohio as a wholly owned subsidiary of the Michigan company. The CRS facility in Elyria bought out the Obitts operation and continued the solvent reclamation activities at the Site.

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[3] *See* Final Guidance on Preparing Waste-In Lists and Volumetric Rankings Under CERCLA, OSWER Directive 9835.16, February 22, 1991. U.S. EPA 1991.

[4] CRS Michigan operated a solvent reclamation facility in Romulus, Michigan. This corporate entity set up a wholly owned subsidiary, Chemical Recovery Systems of Ohio, to take over the Elyria, Ohio operations at the Site and run the solvent reclamation business set up at that Site by Russell Obitts. Mr. Obitts was apparently retained by CRS Ohio for several years as a consultant. CRS Ohio continued to service the customer base Mr. Obitts had developed.

As noted previously, the CRS corporate officer provided a substantial quantity of CRS company records giving details of Site operations. These records included a number of documents that were useful in determining quantities of spent solvent sent to the Site by various companies. The records covered the span of CRS operations (1974-1981) and the latter years of that period appeared to be more thoroughly documented than the early years. Some records were included regarding the period of operation under Mr. Obitts, but this period (1960-1974) appears to be documented only sparsely in the surviving records. The records and the witnesses together attest that the CRS facility continued to service the Obitts customer list, although new customers were also added over time.

U.S. EPA had all the CRS company records relevant to liability at the Site scanned into the Superfund Document Management System Database, along with other Site records. A compact disk was burned for distribution to the PRPs at this Site so that all PRPs had access to the CRS company records. The Group made a special request that U.S. EPA prepare hard copies of the CRS company records for the Group's benefit, as well as the CD of the scanned record. U.S. EPA gave the Group all the CRS company records in paper form as well as on CD.

The documents found in the CRS company records included a series of typewritten sheets labeled as "Dirty Inventory." Entries on these sheets gave a record of shipments from 1974-1981. These records gave details for individual shipments of spent solvents to the Site, including the name of the company that sent the shipment, the quantity, expressed as a number of drums or gallons or pounds, in each shipment recorded therein, the date the shipment arrived and a brief description of the chemical (e.g., "scrap thinner," "mask wash" or "dirty solvent"). Sometimes the description gave a specific chemical name (e.g., "trichlor" or "methylene chloride").

The records also included a set of accounting ledgers which gave the accounts receivable and accounts payable (primarily for the period from 1974-1981). Line items in these ledgers offered strong evidence of whether the transaction involved a shipment of scrap solvent to the Site. For example, the Accounts Receivable ledgers contained line items for "sludge disposal" associated with records of payments from some customers, while the Accounts Payable ledgers showed line items for the purchase of "scrap solvent for reclamation" associated with records of payments to some customers (e.g., Sherwin-Williams, PPG and Avery Dennison).

Witness testimony indicated that the Site operators obtained scrap solvent in two ways. In some cases CRS was paid by the company that supplied the scrap solvent for the service of hauling it away from the customer to CRS. In other cases, CRS paid money to the company that supplied the scrap solvent which was hauled to CRS. The economics of the solvent reclamation business evidently made this profitable in certain circumstances. The witnesses all agree that all spent solvent sent to the Site from 1960-1981 was hauled in trucks owned and maintained by Obitts or

CRS, and this fleet of tankers and other trucks were driven by Obitts and CRS employees, many of whom have been interviewed by U.S. EPA investigators.

This testimony combined with line items in the ledgers (e.g., a line item for "sludge disposal" in the accounts receivable records, or one for purchase of scrap solvent for reclamation in the accounts payable records) indicated that transactions in both accounts receivable and accounts payable records should be considered in developing a volumetric ranking for the Site.

In addition to the Site records provided by CRS, U.S. EPA had a number of admissions regarding scrap solvent sent to the Site, provided in the responses to Section 104(e) information requests sent under CERCLA.

Thus, the Waste-In list prepared by TechLaw for U.S. EPA was based on the accounting records kept by CRS, the "Dirty Inventory" lists kept by CRS, and the 104(e) responses submitted by PRPs. The witness statements were checked against the records for consistency and also used to support a determination from the records that the company in question had sent spent solvent to the Site, but witness statements regarding quantity and/or frequency of such shipments were not used as an independent basis for attributing additional quantity of spent solvent sent (waste-in) to individual PRPs[5].

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[5] However, once the volumetric ranking was essentially complete and revised to its current form, before making a final determination that a party should be considered a *de minimis* contributor, U.S. EPA examined all the witness statements to find out whether a company that seemed to be *de minimis* based on the CRS company records had nevertheless been identified by multiple witnesses as a large, frequent, regular contributor of spent solvent to the Site over a significant period of time. The Agency used witness testimony in this instance to supplement the CRS company records because (1) the records provided by the CRS company did not adequately document the early part of the Site's history of operations, (2) the employment periods of the witnesses interviewed did cover part of the Site's history of operations which was not well documented by the CRS company records, and (3) U.S. EPA wished to avoid, as much as possible, unfairly offering *de minimis* settlements to large contributors simply because their transactions with the Site were not captured in the remaining CRS company records. Witness testimony of large, frequent, regular contributions of spent solvent to the Site over a significant period of time resulted in an Agency decision **not** to extend *de minimis* offers to five large companies (most of them members of the Group) because witness testimony provided convincing evidence that these parties had sent far more spent solvent to the Site than the available, remaining CRS company records indicated. According to witness testimony, each of these five companies appeared to have sent such large, frequent, regular contributions of spent solvent to the Site over a significant period of time that none of them could fairly be considered

The PRPs were all kept informed of this ongoing project and were given an opportunity to comment on the process by which U.S. EPA and TechLaw elected to proceed. On September 28, 2001, U.S. EPA mailed to all PRPs a document explaining the process by which the volumetric ranking would be developed from the information available regarding shipments of spent solvent to the Site. U.S. EPA invited comments from all PRPs on the proposed process for developing the Volumetric Ranking, and were informed that U.S. EPA intended to use the Volumetric Ranking, when it was completed, as a basis for proposing *de minimis* settlements. A number of comments were received. U.S. EPA prepared a Responsiveness Summary which was mailed to all PRPs, responding to all significant comments received during the period established for comment, and indicating revisions in the proposed approach to developing the Volumetric Ranking.

Based on the Waste-In list, TechLaw developed a volumetric ranking to indicate relative quantities of spent solvent sent to the Site by generator companies, based on the available records. This volumetric ranking allowed the Agency to attribute relative percentages of total volumes sent to the Site to individual PRPs. This knowledge was essential to the development of *de minimis* settlement offers.

Development of De Minimis Offers

U.S. EPA guidance documents provide direction to Agency employees on the methods to follow in developing *de minimis* settlement offers.[6] The guidances indicate that the *de minimis* settlement offer may be derived by multiplying the percentage of total waste volume contribution to the Site attributed to an individual PRP by the past costs and adding that number to a second figure derived by multiplying the percentage of waste volume contribution attributed to a PRP by the estimated future costs of investigating and cleaning up the Site. These two numbers (past costs times percentage of waste volume contributed plus estimated future costs times percentage of waste volume contributed) are added together to produce the baseline amount and a premium (from 50% to 100% of future costs, depending on the presence or absence of a re-opener provision for future costs) is added to the combined total. The premium is added to cover uncertainties associated with unknown contingencies regarding future costs.

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as *de minimis* or offered an opportunity to participate in this settlement without manifest unfairness to other parties.

[6] *See, e.g.*, "Standardizing the De Minimis Premium," U.S. EPA, July 7, 1995. *See also* "Streamlined Approach for Settlements with De Minimis Waste Contributors under CERCLA Section 122(g)(1)(A)" U.S. EPA, July 30, 1993.

An Itemized Cost Summary dated June 30, 2002, shows the past costs at this Site totaled $772,427.19 at that time. The U.S. EPA Remedial Project Manager (RPM), based on cost estimates provided by a U.S. EPA contractor (TetraTech) and supported also by personal knowledge of the Site as revealed by previous investigations, made a reasonable estimate of anticipated future costs likely to be incurred by the PRPs to complete the RI/FS, and has also estimated the likely range of contractor costs for oversight of the PRP-led RI/FS (including sampling and analytical costs). Allowing for other costs likely to be incurred by U.S. EPA and its contractors as efforts continue on cost recovery and associated negotiations, the Agency estimated total future costs through the conclusion of the RI/FS and the issuance of a Record of Decision for the Site as between $400,000 and $750,000.

Estimated future costs for implementing the Record of Decision are relatively low. This is primarily because the Site is relatively small (2.3 acres), and there is evidence in the record that migration of contaminated groundwater will probably not be a cognizable factor in any risk assessment (the Site is on a peninsula with the Black River down gradient; previous investigations revealed no actual or potential receptors).

Furthermore, the Site, like the surrounding neighborhood, seems most likely to continue to be used for industrial storage purposes. The Site has most recently been used to store junk cars and used aluminum for recycling; the next door neighbor is a chemical manufacturing company which occupies most of the peninsula already. No residential receptors, current or potential, have been found. The RPM has estimated $200,000 to $300,000 for post-ROD cleanup costs. Even when other costs (oversight, operation and maintenance, continuing efforts to recover costs, negotiations, etc.) are factored in, estimated future costs post-ROD are likely to range no higher than $375,000 to $750,000. These estimates produce a range of future cost estimates running from a low end of $775,000 to an upper boundary of $1,500,000. The proposed settlements are based on the upper end of this range to produce a conservative figure.

The guidance on standardizing the *de minimis* premium draws a balance between two factors. Premiums may run between a range of 50%-100% based on uncertainties regarding future costs and an incentive for early settlement.[7] U.S. EPA has proposed this early *de minimis* settlement based on a full 100% premium for the future costs component of the baseline amount (without reopener), added to the baseline amount calculated as described above. The 100% premium is appropriate because the RI/FS field work has only recently begun. This is consistent with the July 7, 1995 Guidance on Standardizing the De Minimis Premium.[8]

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[7] *See* "Standardizing the De Minimis Premium," U.S. EPA, July 7, 1995.

[8] *Ibid*

The guidance states that in certain site-specific circumstances, it may be advisable to seek to recover a premium for past costs as well as future costs. [9] At this Site relatively substantial past costs already exist. Therefore, U.S. EPA decided to impose a 100% premium for past costs as well as future costs in this initial round of early *de minimis* settlements.

COMMENTS and RESPONSES

Comments Provided by the PRP Group

The CRS Site PRP Group (the Group), PRPs who signed the Administrative Order on Consent for RI/FS which U.S. EPA signed and issued on May 29, 2002, who style themselves as the "Performing Parties," have offered comments on the proposed administrative settlement for recovery of response costs concerning the Chemical Recovery Systems Superfund Site in Elyria, Ohio. The Group is made up of large companies which contributed large volumes of spent solvent to the Site. The Group objects to the proposed settlement, alleging that it is "inappropriate" and "inadequate." The Group argues that it is "inappropriate" because it is too soon to be certain what total Site costs will be, and "inadequate" because it does not ask parties which sent relatively small quantities of spent solvent to the Site to pay much larger sums to cash out early. The Group believes that the proposed settlement might result in members of the Group being asked some day to pay more than what they feel is their "fair share" at this Site, if in fact their fears that total Site costs may be much greater than U.S. EPA's estimate turn out to be well founded.

U.S. EPA believes that the proposed settlement is appropriate. The proposed settlement will cash out 83 PRPs, who collectively sent what appears to be, at most, 15% of the total volume of spent solvent sent to the Site, for $651,200.[10] Settling with these PRPs now will result in substantial savings for all parties involved at the Site by significantly reducing future transaction costs. U.S. EPA also believes the proposed settlement is substantial, and most certainly "adequate." The primary objection stated by the Group is that U.S. EPA may have significantly underestimated future Site costs. U.S. EPA does not believe that this is the case, but in any event. U.S. EPA has imposed a very substantial premium on those parties joining in the proposed settlement to guard against unforeseen contingencies.

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[9] *Ibid* at Footnote 5.

[10] There are now 133 parties identified as PRPs at the Site. Even after the 83 *de minimis* parties have cashed out, 50 parties will remain jointly and severally responsible for the costs incurred at the Site which have not been reimbursed.

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Comment: The Group has organized its comments under two principal headings. The first set of comments and objections are headed: "Total Site costs remain speculative." The Group claims that this must be the case, because field work on the RI/FS has only just begun; therefore, the Agency must (the Group argues) lack "a sufficient basis to form a reasoned opinion on what, if any, remedial action will be required at the Site or the likely cost to clean up the Site, assuming that remedial action is required."

Response: There must always be some elements of uncertainty attendant upon any attempt to estimate future costs at any Site. Yet U.S. EPA is constantly called on to make such estimates. In developing Action memoranda for removal actions, making claims in bankruptcy proceedings, developing cost estimates for proposed settlements such as the one proposed here, U.S. EPA is frequently asked to predict now how much may be spent in the future.

No one can be absolutely certain in such circumstances as to exactly how much will be spent as future costs incurred. However, the Agency and its employees have some experience at making such estimates. And the Agency compensates for the inevitable uncertainty by allowing for unforeseen contingencies. In the case of *de minimis* settlements, the Agency guidance allows for the addition of a premium, as some measure of protection against contingencies, unforeseen or unforeseeable.

In the case of early *de minimis* settlements, the guidance allows the Agency to impose a larger premium, to protect against what might be thought of as potentially greater uncertainties.[11] In the present case, the Agency has imposed a premium of 100%, and the Agency has imposed this premium on the entire baseline amount, including both the known past costs and the unknown (but reasonably estimated) future costs.

The Agency's estimate of total Site costs, based on the best reasonable estimate of future costs the Remedial Project Manager could make after consultation with her technical consultants, was expressed as a range, from $1.5-$2.25 million. The Agency could have chosen the low end of this range or the mid-point as a basis for calculating the *de minimis* settlement offers it made. However, the Agency chose the uppermost end of the range of estimates provided by its technical experts. To this already high estimate the Agency imposed a full 100% premium for all total Site costs (both past and future) anticipated as likely to be expended by both U.S. EPA and the PRPs at this Site. This produced a figure of $4.5 million, and it was from this figure that U.S. EPA derived the settlement offers it made to the 83 *de minimis* parties.

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[11] *See e.g.*, "Standardizing the De Minimis Premium," U.S. EPA, July 7, 1995.

While the RI/FS field work has only just begun, the Agency is not "without sufficient basis" to make a reasonable estimate of future Site costs. On the contrary, the Agency already has quite a lot of information about the Site. The Site is known to be 2.3 acres in size, isolated, on a peninsula, on the bank of a river, next to a large chemical plant in a heavily industrialized area.

On April 26, 1982, U.S. EPA completed a Hydrogeologic and Extent of Contamination Field Investigation Study and issued a report (U.S. EPA 1982–FIT Project Report); on August 8, 1995, U.S. EPA issued its Focused Site Inspection Prioritization Site Evaluation Report. On September 29, 1997, Ohio EPA (OEPA), having conducted a Site Team Evaluation Prioritization Investigation at the Site, issued a report on the investigation (OEPA 1997, STEP Report).

It is known that ground water flows toward the river. This was determined by a CERCLA study performed in 1982, which also determined that ground water flowed at 33 feet per year and that this flow sent 59,000 gallons of ground water a year into the river from the Site. (FIT Report)

The studies conducted at the Site by U.S. EPA and OEPA and others have produced significant data on soil and groundwater contamination at the Site. This data was reported in the reports issued by U.S. EPA in 1982 and 1995 and by OEPA in 1997. The CRS Group comments refer disparagingly to this body of information as "dated data." However, it is also known that solvent reclamation activities at the Site ceased over twenty years ago, and nothing in the record suggests that any additional pollutants or contaminants have been added to the Site since companies that sent spent solvent to the Site ceased to do so more than two decades ago.

The most recent study at the Site which produced new sampling and analytical data was conducted by OEPA. Based on the data collected in 1996 and the analytical results reported in the 1997 STEP report, OEPA believes a high potential exists for ground water contamination to leach into the surface water. The potential for private drinking water supplies to be impacted by the Site is believed to be relatively low because the River acts as a hydraulic barrier between the Site and most down gradient receptors. In the 1997 STEP report, OEPA states the conclusion that the impact to the surface water from the Site needs further investigation through the collection of additional sampling and investigatory work. (OEPA 1997).

As for the soil pathway, in 1996, no residences, schools, day care facilities or sensitive populations were located close to the Site. The Site is located in an industrial/commercial area. Only one upgradient resident was located within one mile of the Site. (OEPA 1997). The primary potential threat of exposure to the soil is from direct contact to workers or by trespassers who approach the Site from the portion near the River that is not fenced, according to the conclusions drawn in the STEP report.

The 1996 OEPA investigation evaluated surface water pathway targets from the probable point of entry (PPE) where the Site runoff enters the River to the Target Distance Limit (TDL) 15 miles downstream where the River enters Lake Erie. Targets evaluated in such investigations typically include surface water intakes that supply drinking water, fisheries, and sensitive environments. From the Site, surface water runoff flows into the East Branch of the Black River and eventually joins with the main branch of the Black River. The Black River flows north by northeast, emptying into Lake Erie. From the PPE to the TDL there are no surface water intakes that supply drinking water.

All of this data suggests that exposure pathways for remaining Site contamination may be somewhat limited. On July 2, 1999, the Agency for Toxic Substances and Disease Registry (ATSDR) with the support of the City of Elyria Health Department completed a Health Consultation which provided information about the potential health effects associated with the Site. The ATSDR concluded that the site "currently poses no apparent public health hazard to area residents. On-site workers could come into contact with low levels of contaminants in surface soils at the CRS property, but currently detected concentrations of those chemicals in the surface soils pose a minimal health hazard to possible workers." (ATSDR Report).

In developing its estimate of total future Site costs, U.S. EPA considered: (1) the known past costs, (2) the reasonably expected costs anticipated for pre-record of decision (pre-ROD) work, including the cost of performing the RI/FS and U.S. EPA oversight (also considering the contingency if U.S. EPA was forced to complete the RI/FS if the AOC Respondents failed to do so); and (3) U.S. EPA also considered the anticipated post-ROD costs, for the most likely range of remedial actions including U.S. EPA oversight (and a contingency if U.S. EPA was forced to complete the remedial action if the PRPs failed to do so) expected at the Site in the light of currently available information as detailed above; and (4) U.S. EPA also considered operation and maintenance costs that might reasonably be expected for the most likely range of remedial actions; (5) U.S. EPA also considered that certain enforcement costs were likely to continue to be incurred as U.S. EPA continued its PRP search and cost recovery efforts at this Site; finally, U.S. EPA considered the potential contingencies that might arise if unexpected discoveries during the investigation revealed conditions warranting a "hot-spot" removal action.

In summary, in response to the CRS Group's first set of comments, U.S. EPA believes that it acted with knowledge of the Site and the evidence of contamination there, based on previous studies, sufficient to provide an adequate basis for making a reasonable estimate of anticipated total future Site costs, considering all relevant factors in full accordance with Agency guidance. Therefore U.S. EPA believes the proposed settlement is both adequate, appropriate and should

proceed as it will fulfill the Agency's policy "to encourage more, early and expedited settlements, and reduce the transaction costs of all parties."[12]

Comment: The CRS Group's second set of comments is grouped together under the heading: "EPA has Insufficient Information to Identify De Minimis Parties." In this collection of comments the Group attacks the Volumetric Ranking which TechLaw prepared for this Site. The Group argues that the records the CRS company provided to U.S. EPA have not been authenticated or accepted as evidence by a court. The Group argues that based upon its experience, additional information, not provided by PRPs like the Group members, in responses to 104(e) requests, is likely to become available (the Group asserts) during the discovery phases of cost recovery lawsuits. Thus, the Group argues, U.S. EPA has no adequate basis now to determine that some parties are *de minimis*, since U.S. EPA does not now possess perfect evidence, certified as admissible in a cost recovery proceeding, to demonstrate with certainty the source of each gallon of spent solvent ever sent to the Site.

Response: The comment seems to suggest that it is improper for U.S. EPA to enter into *de minimis* settlements until all the evidence of who sent spent solvent to the Site has been thoroughly litigated in federal court. This position if accepted would defeat an important purpose of the statute with regard to Section 122 (g). (i.e., Whenever practicable and in the public interest to reach an expedited final settlement with de minimis PRPs when in the judgment of the President's delegate those PRPs contributed minimal hazardous substances in comparison to other hazardous substances at the facility, in terms of amounts and toxicity.) U.S. EPA has told all the PRPs identified at the Site that these Site records provided by the CRS company, used by TechLaw as the basis for the volumetric ranking which U.S. EPA used as a sufficient basis for determining which parties are *de minimis* contributors at this Site, were incomplete and only provide limited information about which companies sent spent solvent to the Site. There are many years of operation for which little or no information is available.

Nevertheless, the records do provide a great deal of information about certain periods. A lot of information in the records discloses which PRPs sent how many gallons of spent solvent on specific occasions. The records document the shipment of over 5,000,000 gallons of spent solvent to the Site.

Although the authenticity of the CRS records or their admissibility in cost recovery proceedings has not yet been litigated, U.S. EPA is confident that, when and if called upon to do so, a court will definitely admit the CRS records as authentic evidence of shipments of spent solvent to the

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[12] *See* Streamlined Approach for Settlements with De Minimis Waste Contributors under CERCLA Section 122(g)(1)(A) U.S. EPA, July 30, 1993.

Site. However, admissability in a trial is not a necessary criteria for use in the decision to enter into these de minimis settlement agreements. As demonstrated by this Response to Comments, those documents contain reliable information that is sufficient to make the determination to enter into these settlement agreements under Section 122(g).

The records were provided to U.S. EPA by the registered agent for service of process of Chemical Recovery Systems Inc., a Michigan corporation, the corporate parent of the now defunct Chemical Recovery Systems Inc. of Elyria, Ohio, an Ohio corporation, which operated a solvent reclamation facility on the Site for seven years. The individual who provided the records to U.S. EPA did so in response to a CERCLA 104(e) information request. This individual was a corporate officer of CRS Michigan, who was also the prime mover in setting up the CRS Ohio corporation which operated the Elyria facility on the Site. U.S. EPA believes these records provide the best available evidence regarding the relative quantities of spent solvent sent to the Site by all identified PRPs, and U.S. EPA believes they provide an appropriate and sufficient evidentiary basis for making the determinations upon which the proposed settlement is based. These records demonstrate that the waste disposed at the site which is attributable to each of the settling de minimis parties is minimal in both amount and toxicity compared to amount of wastes from other parties and the settlement of their liability amounts to only a minor portion of the response costs at the facility.

Comment: While adamantly refusing to admit anything and insisting that nothing in their comments endorses use of the CRS records to determine volumes of spent solvent sent to the Site, the CRS Group goes on to argue that if you look only at one set of records while ignoring the other two sets, you can argue that some PRPs identified by U.S. EPA as *de minimis* are "really" over the 1% line which U.S. EPA used as a cutoff point in making the determination.

Response: The CRS records included three principal sources of evidence as to which companies identified in those records sent specific shipments on certain dates of definite quantities of spent solvent to the Site. These three sources are the Dirty Inventory lists, the Accounts receivable records and the accounts payable records. TechLaw and U.S. EPA considered all three sources of evidence, as well as 104(e) records, in preparing the Waste In list and the Volumetric Ranking.

Of the three sources of evidence found in the CRS company records, the Dirty Inventory lists are most specific. These records provide the dates on which specific shipments arrived, the number of gallons, pounds or drums received at the Site in each shipment and frequently indicate the contents of the shipment (*e.g.*, "mask wash," "trichlor," "scrap solvent," "dirty thinner," etc.) and always provide the name of the company that sent the shipment.

The Accounts Receivable records and the Accounts Payable records[13] also provide company names and dates which probably reflect dates accounts were billed or booked, but which can be correlated in many cases with shipment dates provided by the Dirty Inventory Lists. All three sets of records overlap to some extent, in covering portions of the period of site operations under the CRS company. In developing the Waste In list for the Site, TechLaw used all three sets of CRS company records, i.e., the "Dirty Inventory" lists, the Accounts Receivable records and the Accounts Payable records.

In doing so, TechLaw made careful comparison of the data from all three sets of records and was able to match specific, dated entries on the Dirty Inventory lists to specific, dated entries from the other records. This allowed TechLaw and the Agency to avoid counting individual shipments of spent solvent twice just because they were recorded twice (once in the Dirty Inventory lists and once in the accounting records). This comparison also enabled TechLaw to match entries recorded in gallons from the Dirty Inventory lists with entries recorded in dollars in the accounting records. This enabled TechLaw to assign proxy values in gallons to records which were kept in dollar figures.

When compared and analyzed in this way, the three sets of records kept by the CRS company produce a valid composite picture of shipments of spent solvent sent to the Site over a period of time from which one can derive a reasonably accurate idea of the total volume of spent solvent sent to the Site by PRPs, to the extent it was recorded and that record preserved in the company records provided by the CRS company to U.S. EPA. From this it is possible to derive a reasonably accurate indication of the percentage of that volume sent to the Site which came from each individual PRP.

To look at any one set of these records in isolation and then to calculate a total volume based on **only** that one set of records (e.g., using **only** the Dirty Inventory lists or **only** the Accounts Payable records) would be a duplicitous exercise which would actually distort the relative amounts sent to the Site by individual PRPs. For example, a PRP which was paid for most or all of the spent solvent it sent to the Site (as evidenced by the Accounts Payable records that it received regular cash payments for "scrap solvent for reclamation") might seem to become *de minimis* or vanish from the ranking altogether if one looked **only** at accounts receivable.

The Group and the only other party that provided comments have offered charts purporting to show that some PRPs participating in the proposed settlement could be interpreted to have sent more than 1% of total spent solvent sent to the Site, if **only** U.S. EPA would ignore some of the

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[13] The CRS company kept Purchase Payment Journals which were evidently kept up on a daily basis with entries therein later being transcribed into the Accounts Payable ledgers.

CRS company records and look **only** at the records which produced that skewing of the relative percentages. This procedure suggested by the Group cannot be justified on any reasonable grounds and would be manifestly unfair to some parties by irrationally distorting the relative percentage of spent solvent they sent to the Site.

Comment: The Group has also commented that the CRS company records, and the Waste In list and Volumetric Ranking prepared by TechLaw, all show that a significant quantity (perhaps 15%) of the total volume of spent solvent sent to the Site was sent by companies whose names appear in these documents, but for whom no PRP has been identified. If no currently viable entity is found to pay for these contributions of spent solvent to the Site, the Group fears it may be asked to pay for an orphan share. The group feels this is unfair. The Group suggests that U.S. EPA should remove any volume it does not currently attribute to any specific currently viable and liable party before any volumetric ranking is calculated for the Site.

Response: U.S. EPA has recently discovered some parties that may be responsible for a portion of the quantity the Group fears may be left as an orphan share, but U.S. EPA agrees with the Group that it is possible, if not likely, that there may remain, at the end of the day, an orphan share of some significance, though probably not as large as the Group fears. U.S. EPA guidance recommends seeking to compel the larger contributors to absorb the cost of any orphan share, so the fear expressed by the Group is understandable.

The suggestion of the Group (removing the alleged "orphan share" from total site volume before calculating a volumetric ranking) would have the secondary effect (perhaps an "unintended consequence" from the Group's perspective) of significantly reducing total Site volume, raising the percentage share of all parties thereby, and offering the Group new arguments that some parties that contributed far less to the Site contamination than the members of the Group were no longer "entitled" to a *de minimis* settlement offer. U.S. EPA believes that the procedure it followed of counting all known volumes of spent solvent sent to the Site, and basing the volumetric ranking on that known total was the correct one.

U.S. EPA does wish to be fair to all PRPs at this Site, whether large or small. Therefore, U.S. EPA will be prepared to consider any suggestions that may be made at some later stage of the Superfund process regarding the most appropriate way of dealing with any "orphan share" that may remain, if any such "orphan share" has not already been adopted by PRPs discovered as the process continues.

Comment: The Group argues that PRPs should be excluded from de minimis settlements if they sent wastes that will impact the Site and/or the costs of cleanup disproportionately to their volume. The Group argues that the settlement is inappropriate because it is too early to judge

which PRPs should be excluded from this settlement. The Group has previously asked U.S. EPA to exclude those parties who sent chlorinated solvents.

Response: All PRPs at this Site are known to have sent spent solvents to the Site. The extensive sampling and analytical work already done at the Site shows that elevated levels of solvents remain in subsurface soil, leachate and shallow ground water. Most of the CRS company records do not distinguish which PRPs sent which chemicals. The Dirty Inventory lists are occasionally more specific. But the Group does not admit that the Dirty Inventory lists are authentic or can be used for any purpose. In any event, both chlorinated and non-chlorinated solvents are known to be extremely toxic (e.g., benzene and vinyl chloride are both known carcinogens).

U.S. EPA does not think the Group has shown or can show that divisibility of harm arguments should apply at this Site. The Agency rejects the Group's argument that it would be more appropriate to wait in hope that new evidence might turn up later. Both the statute and the guidance encourage U.S. EPA to enter into de minimis settlements at an early stage of the process, and U.S. EPA believes that it now has ample evidence both regarding PRP contributions and conditions at the Site to enter into the proposed settlements at this time.

Comment: The Group also objects because it has recently received a copy of what it evidently believes to be a recent revision of the Volumetric Ranking, which the Group claims "made significant changes." The Group protests that U.S. EPA acted "improperly" in making de minimis offers "despite this additional evidence."

Response: The Group is confused here. The document referred to was actually last revised in December of 2002, before any offers were made. The September 4, 2003 date printed on the document evidently led the Group into error. TechLaw uses a software program which automatically prints the current date on any document when it is printed, so this December 2002 revision bears the date it was last printed. The decisions the Agency made were all based on this very same document, which was last revised in December 2002, before any decisions were made.

In any case, the latest revision of the Volumetric Ranking for this Site did not make changes "significant" in the sense the Group uses the term. The changes made in this last revision (December 2002) lowered only one party's "share" by eliminating certain quantities which U.S. EPA and TechLaw determined had not actually been sent to the Site. This party was not considered *de minimis* either before or after this change. A secondary effect was the lowering of total Site volume sent by all PRPs to the Site by a few gallons, but the effect on any other party's percentage share was too minuscule (in the fourth or fifth decimal place) to affect the Agency's decision on which parties should receive a *de minimis* offer.

Comments Provided by Sherwin-Williams

Administrative Order on Consent Under Section 122(g)(1)(A) of CERCLA for the Chemical Recovery Systems Site, Elyria, Ohio Docket No. V-W-03-C-750
Response to Comments

The Sherwin-Williams Company (Sherwin-Williams), by and through its attorneys at Walter & Haverfield, LLP, has also offered comments on the proposed settlement. Sherwin-Williams also has commented previously on the Volumetric Ranking prepared for U.S. EPA at this Site by TechLaw Inc. Sherwin-Williams objects to the volumetric ranking on several grounds. Sherwin-Williams therefore objects to the *de minimis* settlement because of these objections to the volumetric ranking. Sherwin-Williams is also a member of the Group. Many of its comments echo those already expressed by the Group; nevertheless, Sherwin-Williams elected to submit its own comments, and U.S. EPA is providing the additional responses given below.

Comments on the Volumetric Ranking

Sherwin-Williams has commented in great detail, both in letters written earlier (December 13, 2002 and February 21, 2003) and again in its current comments, on the volumetric ranking prepared by TechLaw for U.S. EPA, objecting first to the evidence on which the ranking was based, then to both the assumptions employed and the methods used to produce the ranking and identify candidates for a *de minimis* settlement. U.S. EPA has carefully considered all these comments.

Comment: Sherwin-Williams objects to the use of the "Dirty Inventory" lists found among the CRS records. Sherwin-Williams objects that these records "are neither authenticated or explained." Sherwin-Williams also objects that these records cover only a short period of the Site history, with shipments recorded dating from 1974-1981, while the Site was known to be in operation for twenty years.

Response: This objection as to authenticity and/or admissibility has already been addressed as a comment by the Group, above. As noted above, although the authenticity of the CRS records or their admissibility in cost recovery proceedings has not yet been litigated, U.S. EPA is completely confident that, when and if called upon to do so, a court will admit the CRS records as authentic evidence of shipments of spent solvent sent to the Site.

As stated above, the records were provided to U.S. EPA by the registered agent for service of process of Chemical Recovery Systems Inc., a Michigan Corporation, the corporate parent of the now defunct Chemical Recovery Systems Inc. of Elyria, Ohio, an Ohio corporation, which operated a solvent reclamation facility on the Site for seven years. The individual who provided the records to U.S. EPA did so in response to a CERCLA 104(e) information request. This individual was a corporate officer of CRS Michigan, who was also the prime mover in setting up the CRS Ohio corporation which operated the Elyria facility on the Site. U.S. EPA believes these records provide the best available evidence regarding the relative quantities of spent solvent sent to the Site by all identified PRPs, and U.S. EPA believes they provide an appropriate and

sufficient evidentiary basis for making the determinations upon which the proposed settlement is based.

In this comment, Sherwin-Williams also objected that the records are incomplete and only cover a portion of the Site's history. It is true that the CRS company records are not complete and that shipments of spent solvents sent to the Site during the first decade of operations are only sparsely documented[14]. However, the testimony of all the witnesses, and even what records are available for the earliest period of Site operation show that the Site began operation with a few customers and added more later.

The best documented period is also the period when the most companies were sending shipments of solvent to the Site. As noted before, the records and the witnesses together attest that the CRS facility continued to service the Obitts customer list, although new customers were also added over time. As noted above, Mrs. Obitts has stated that when her husband began the business, its principal customer and the primary source of spent solvent sent to the Site was Sherwin-Williams.

A total of nine truck drivers employed by Obitts and Chemical Recovery Systems, Inc. have stated that Sherwin-Williams of Cleveland, Ohio, was a customer from which they hauled shipments of spent solvent to the Site. One of these truck drivers said that he considered Sherwin-Williams to be a frequent Obitts and CRS customer as Sherwin-Williams could have had two pickups of dirty chemicals per month over a period from about the mid 1960s to the early 1980s. The amounts varied from full to partial tanker trailers.

Another of these truck drivers stated that he and other truck drivers picked up a total of about 40 drums of dirty chemicals a week from Sherwin-Williams every week for a period from about the late 1960s to the early1970s. Another truck driver said that, during a period in the mid 1960s, he drove semi trucks hauling tanker trailers exclusively from and to Sherwin-Williams on Flats Road and another company both of which were located in Cleveland, Ohio. It was common for him to transport one tanker trailer and one truck load of drums containing dirty chemicals from these two companies, together, on a daily basis. Collectively, these Obitts and CRS truck drivers were employed from about 1960 to the early 1980s.

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[14] The remaining records available do document some transactions from 1960, 1965, 1968 and from 1970-1974. There are unquestionably gaps in the record for certain years of solvent reclamation activity at the Site, particularly during the first decade of operation, from 1960-1970.

A total of five former administrative employees for Obitts and CRS identified Sherwin-Williams as a customer that had hazardous materials sent to the Site. One of these former employees said that Sherwin-Williams was probably the largest customer for a period from about the early1960s to the early 1970s. Another one of them said that Sherwin-Williams was one of about four companies that Obitts/CRS did the most business with for a period from about the mid 1970s to early 1980s. Collectively, these former employees worked at the Site from about 1960 to the early 1980s.

A total of three operators/laborers for Obitts and CRS identified Sherwin-Williams as a customer that had hazardous materials sent to the Site. One of these former employees stated that it was common for Obitts and CRS workers to "run over" or spill chemicals while pumping them from one container into another. He recalled one particular occurrence at night when a careless employee allowed dirty chemicals from Sherwin-Williams, being pumped to tanks within the diked wall at the Site, to start spilling over onto the bare ground. Collectively, these former employees worked at the Site from about the early 1960s to the early 1980s.

It seems somewhat unlikely that many additional Site records of the shipment of spent solvent to the Site will be found. But even if additional documents could be found they would be likely to so increase the share of such disproportionately large contributors as Sherwin-Williams and others who were frequent and regular large volume contributors over time ever since the facility began solvent reclamation activities, that the relative percentages of lower volume contributors would almost certainly decrease as a percentage of total volume of spent solvent sent to the Site, even in cases where the actual number of gallons attributed to a small-volume contributor increased.

Other Objections to the Proposed Settlement

Comment: Another objection cited in Sherwin-Williams' comments is that the proposed settlement allows PRPs to "cash-out before the remedy has been identified." Sherwin-Williams also objects that there is "no basis in the record to develop a remedial cost estimate." Furthermore, Sherwin-Williams objects that the proposed settlements "rely on an estimate of total site costs that has been developed without the benefit of the remedial investigation data." Sherwin-Williams concludes by asserting that "a significant risk remains that the estimated site cost used to value the *de minimis* settlements will be too low to cover the actual Site costs, even with a significant premium."

Response: As these closely related objections to the proposed settlement are gathered together in one paragraph of Sherwin-Williams' comment letter, this response will address them together. Taken together they may be reduced to a single point, that the RI/FS process has not concluded

and the remedy has not yet been identified, therefore some uncertainty remains as to the actual total site costs. This comment, or one extremely similar to it, has been made by the Group and is already addressed above, at pages 10-13 of this Response to Comments. A few points are reiterated, below.

The Agency's policy and guidance for *de minimis* settlements encourages the use of the *de minimis* settlement mechanism at an early stage of the Superfund process.[15] The goal of the policy is to minimize transaction costs for all parties as much as possible by cashing out large numbers of *de minimis* PRPs at an early stage in the process. Agency guidance anticipates that there may be more or less uncertainty regarding future site costs (and therefore total site costs) and compensates for this uncertainty by allowing for the Agency to charge a premium to those parties who elect to cash out by entering into a *de minimis* settlement with the Agency.

At this Site, the Agency has identified a large number of PRPs. Currently, the PRP list identifies 133 parties as potentially responsible for costs incurred at the Site.[16] The Agency believes that it will be to the benefit of all parties at the Site to use all the settlement tools available to the Agency as early as possible in the process, thus minimizing transaction costs by reducing the number of parties involved. The proposed settlement will cash out 83 PRPs, leaving 50.[17]

While field work on the RI/FS has only just begun, the Agency is not without significant information regarding the Site and the contamination found there in the past. Previous actions and studies have reduced and defined the contamination significantly. The geology and hydrogeology of the Site is fairly well known already. The isolated physical location of the Site, and the results of previous studies have made it possible for the Agency to make relatively well informed estimates of the likely parameters and potential cost of the most probable remedial actions that may be required at the Site.

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[15] *See e.g.,* Streamlined Approach for Settlements with De Minimis Waste Contributors under CERCLA Section 122(g)(1)(A) U.S. EPA, July 30, 1993.

[16] This number has fluctuated over time, increasing as new PRPs were identified, and decreasing as some PRPs were dropped from the list in the light of new information, or as the list was consolidated to eliminate multiple iterations of the same company name where several plant locations had originally been identified, each plant listed as a separate PRP.

[17] This number is expected to increase soon. Additional general notice letters are currently being developed by the Agency to identify new PRPs, including several whom the Agency believes sent significant (non- *de minimis*) quantities of spent solvent to the Site.

Based on this information, the project manager and her consultant have been able to develop reasonable estimates of the range of future costs that can reasonably be anticipated. Of course, such estimates cannot be made with absolute certainty; however, the guidance anticipates the lack of such certainty for *de minimis* settlements and provides for the imposition of a premium to guard against unknown contingencies. The Agency believes it has sufficient knowledge of the Site to proceed under these circumstances.

Comment: Sherwin-Williams also objects that the Agency has not provided a detailed "basis and supporting documentation" for "U.S. EPA's estimates of the total response costs incurred and to be incurred by EPA and private parties." In letters written earlier this year, Sherwin-Williams and its attorneys had demanded that the Agency provide such documentation. Sherwin-Williams complains that its demands were not satisfied and its letters not answered.

Response: U.S. EPA is not obliged to create documentation to satisfy a demand such as the one made by Sherwin-Williams in this matter, nor is it obliged to provide documentation when none is available. The total future cost estimates made by the U.S. EPA were developed by the U.S. EPA remedial project manager (RPM) based on her knowledge of all of the information available regarding the Site, its geophysical characteristics and history, previous investigations and studies, and other information including relevant U.S. EPA policy and guidance. A thorough discussion of that process has already been provided, above, as a response to comments made by the Group.

The RPM met with her consultant to discuss the reasonable future costs of both the PRP and U.S. EPA activities at the Site, at the request of the attorney assigned to the Site for U.S. EPA. These estimated future costs, expressed as a range, were communicated verbally to the Site attorney, who transmitted them to U.S. DOJ in a referral of the proposed *de minimis* settlement agreement. U.S. DOJ approved the proposed settlement and the estimated future site costs are included in the administrative Order on Consent which embodies the proposed *de minimis* settlement. The substance of those discussions and the pertinent part of that referral to U.S. DOJ have been summarized, above, in response to the comments made by the Group on this point.

Comment: Sherwin-Williams also objects to the proposed settlement because, its attorneys allege, "EPA has not notified a number of alleged significant parties."

Response: While somewhat unclearly stated, this objection appears to be based on the fact that the CRS records, as well as the volumetric ranking based on those records, identifies a number of companies by name who seem to have sent spent solvent to the Site, but for whom U.S. EPA and TechLaw have not yet identified a currently viable successor. As noted above, U.S. EPA continues to identify parties who sent significant quantities of spent solvent to the Site. Apparently, Sherwin-Williams believes it is inappropriate to enter into early *de minimis* settlements while PRP search activities continue. U.S. EPA believes that U.S. EPA, not

Sherwin-Williams is the party that should interpret Agency policy and guidance on this question, and U.S. EPA believes it is appropriate to enter into these settlements, even though its PRP search activities still continue and still continue to bear fruit. After all, the discovery tomorrow of a currently viable successor to a company that once sent spent solvent to the Site would not alter by one gallon or the fraction of a percent the quantity sent to the Site by any party, nor would it be likely to increase or decrease the total costs at the Site.

Comment: In a similar vein, Sherwin-Williams objects that certain potentially responsible parties are not participating in the "CRS Group" (this term apparently refers to the parties who signed the AOC for RI/FS). This comment states that the "CRS Group" currently absorbs a substantial amount of volume that it is not responsible for and should be removed before a settlement is considered."

Response: This comment seems to suggest that U.S. EPA should have removed certain volumes from the Waste-In list before preparing a volumetric ranking and determining on the basis of that ranking who was eligible for a *de minimis* settlement. U.S. EPA believes that it acted appropriately at each step of this process of developing the *de minimis* settlement proposed, and that the Agency is acting in accordance with all applicable guidance and the relevant case law. The courts have agreed that U.S. EPA has some discretion in determining who is eligible for a *de minimis* settlement under Section 122(g) of CERCLA. U.S. EPA believes it has been guided at all times by considerations of fairness in developing the proposed settlement, that it has used its discretion wisely, and that the proposed settlement is fair, equitable and in the public interest. For more on this point, refer to the Agency's response given above to the Group's comments regarding "orphan share."

Summary:

In summary, U.S. EPA believes that the proposed settlement is fair, equitable, and in the public interest. The Agency believes that it has a firm basis in its knowledge of the Site gained in several previous studies taken over the last twenty years for making a reasonable estimate of total anticipated future Site costs and that this basis, together with the substantial premium charged to the parties entering into this settlement, is sufficient to ensure that the settlement is adequate. The Agency also believes that the proposed settlement, undertaken at a relatively early stage of the Superfund process at this Site to further the Agency's stated goal "to encourage more, early and expedited settlements, and reduce the transaction costs of all parties,"is entirely appropriate under the factual circumstances existing at this particular Site as more fully set forth above. Likewise, the Agency believes it has adequate information in the record to make reasonable determinations as to which parties at this Site may be allowed to join in this *de minimis* settlement.

The Agency rejects the arguments that it would be more appropriate to wait in hope that new evidence might turn up later. Both the statute and the guidance encourage U.S. EPA to enter into *de minimis* settlements at an early stage of the process, and U.S. EPA believes that it now has sufficient evidence both regarding PRP contributions and conditions at the Site to enter into the proposed settlements at this time.